

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

NOTICE OF INTENT

To: Lifecycle Marketing (Mother and Baby) Ltd

Of: Remenham House, Regatta Place, Marlow Road, Bourne End,
Buckinghamshire, SL8 5TD

1. The Information Commissioner ("the Commissioner") is minded to issue Lifecycle Marketing (Mother and Baby) Ltd ("LCMB") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA") because of a serious contravention of the first data protection principle ("DPP1") from Schedule 1 to the DPA.
2. LCMB contravened DPP1 by selling the personal data of more than 1 million individuals to the Labour Party for use in the Labour Party's general election campaign in 2017 without informing those individuals that it might do so. As a result, LCMB processed that personal data unfairly and without satisfying any processing condition under Schedule 2 DPA.
3. The amount of the monetary penalty which the Commissioner intends to issue is £140,000.
4. This Notice of Intent is served under section 55B of the DPA. It explains the grounds on which the Commissioner intends to issue the monetary penalty. References will in the main be to LCMB, as that was the data

controller's name at the time of the contravention. The Commissioner will consider any representations from LCMB in response to this Notice of Intent before reaching a final decision on this matter.

Legal framework

5. The DPA implemented European legislation (Directive 95/46/EC) aimed at the protection of the individual's fundamental right to the protection of personal data. The DPA must be applied so as to give effect to that Directive. Both the DPA and the Directive have since been repealed, but the contravention at issue in this case took place while they were still in force.
6. LCMB was a data controller, as defined in section 1(1) of the DPA in respect of the processing of personal data. Section 4(4) of the DPA provides that, subject to section 27(1) of the DPA, it is the duty of a data controller to comply with the data protection principles in relation to all personal data in respect of which he is the data controller.
7. The relevant provision of the DPA is DPP1 which provides that:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

8. Interpretative provisions in Part II of Schedule 1 to the DPA provide in relevant part that:

1.- (1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or

misled as to the purpose or purposes for which they are to be processed.

(2)....

2. - (1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless -

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(2) In sub-paragraph (1)(b) "the relevant time" means -

(a) the time when the data controller first process the data, or

(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged -

(i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,

(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or

(iii) in any other case, the end of that period.

(3) The information referred to in sub-paragraph (1) is as follows, namely-

(a) the identity of the data controller,

(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,

(c) the purpose or purposes for which the data are intended to be processed, and

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

3. – (1) Paragraph 2(1)(b) does not apply where either of the primary conditions in sub-paragraph (2), together with such further conditions as may be prescribed by the Secretary of State by order, are met.

(2) The primary conditions referred to in sub-paragraph (1) are -
(a) that the provision of that information would involve disproportionate effort, or
(b) that the recording of the information contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

9. It appears to the Commissioner that two processing conditions from Schedule 2 to the DPA are potentially relevant in cases such as this:

1. The data subject has given his consent to the processing.

...

6.—(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

10. Article 2(h) of the Directive provided that:

'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

11. Section 55A of the DPA empowers the Commissioner to issue monetary penalties. The relevant provisions are as follows:

(1) The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that—
(a) there has been a serious contravention of section 4(4) by the data controller,

*(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
(c) subsection (2) or (3) applies.*

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the data controller—

(a) knew or ought to have known —

*(i) that there was a risk that the contravention would occur, and
(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but*

(b) failed to take reasonable steps to prevent the contravention.

12. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
13. The Commissioner has issued and published statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties.

Factual basis for the proposed penalty

14. Trading as Emma's Diary, LCMB describes itself as "one of the UK's leading baby clubs for mums-to-be, providing expert advice on every aspect of pregnancy and childcare. Its website states that Emma's Diary is "the most widely circulated mother-and-baby publication, with a circulation of 870,000 copies distributed a year". It describes its portfolio as including a database that helps marketers to target their promotional activities for baby-related brands.
15. In May 2017, LCMB supplied 1,065,220 records to Experian Marketing Services under a data supply agreement listing the Labour Party as Experian's client. The data supply agreement specified the delivery date for the data as 5 May 2017. It also said this: "data supplied for use for postal information and insight".

16. Each record comprised the following personal data: name of parent, household address, the presence of children up to 5 years old and date of birth of both mother and child. The records thus comprised the personal data of both mothers and young children. LCMB obtained that personal data via its online registration on its website and via an offline registration form.
17. Experian, apparently acting as an agent or processor on behalf of the Labour Party, loaded those records onto a database it hosted for the Labour Party to assist the Labour Party with a direct marketing mail campaign for the general election in 2017. LCMB told the Commissioner that the records it supplied would have helped the Labour Party send political marketing communications to people with young children about, for example, Labour's intention to protect Sure Start centres. This was done in the constituencies for 106 parliamentary seats. According to LCMB, the records it disclosed were deleted by Experian following the general election on 8 June 2017.
18. In its letter to the Commissioner of 30 January 2018, LCMB told the Commissioner that "All data supplied agreed to be contacted via the postal channel and by 3rd party marketers and the usage of the mums' data is fully outlined within or Privacy Policy." It transpired, however, that this was not the case.
19. The offline registration form in use up to the point of disclosure said this:

"Important: Please Read our Fair Data Policy

The Emma's Diary service includes our programme of selected clubs, special offers and money off coupons for expectant and new mums.

By registering you are agreeing that Lifecycle Marketing (Mother and Baby) Ltd may make your details available to our partners

*including providers of Mother and Baby Goods, Pharmaceutical remedies and toiletries, Insurance and other Financial Services, Research, High street shops and supermarkets, Photography and Utilities so you can receive offers - See more at:
<http://www.emmasdiary.co.uk/contact-legal/privacy-policy>
If you'd rather not receive these, please tick the box."*

20. The privacy policy that appeared on LCMB's website up to 5 May 2017 said this:

"LCMB may also permit selected third parties to use your data to provide you with information about goods and services which may be of interest to you. These third parties are bound by contractual obligations to keep personal information confidential and use it only for the purposes for which we disclose it to them.

By providing LCMB with your email address, landline or mobile telephone number and/or your postal address, you are consenting to being contacted via these channels."

21. Confusingly, the reference to "LCMB" in the privacy policy is to a different company, LCMB Limited (now known as Lifecycle Marketing Group Ltd). In any event, the privacy policy went on to list the clients and business sectors with whom LCMB worked:

"Procter and Gamble, Scottish Friendly Assurance Society Ltd, Barrett & Coe, Hachette, Lansinoh UK Ltd, Get Me A Ticket, Legal & General, Next, My Offers, Window to the Womb, Top Cashback, Ashton & Parsons, Johnson's & Johnson's, Boots PLC. Sky, Clarion Marketing, Mercury Events, MAM UK, Oilateum, TNS, Busy Bees, IPSOS Mori, NCT, Acxiom, Bright Horizons, CACI, Eat Sleep Love, GAP, Ipsos, Party Pieces, Experian Limited, Mama's & Papa's (Holdings) Limited, Direct Line Group, Beagle Street, Philips Avent."

*"Business Sectors with whom we work:
Mother and Baby Consumer Goods, Pharmaceutical, Financial Services, Research, Retail, Photography, Utilities, Automotive, Education, Mail Order, Telecoms, Toiletries/Cosmetics, Travel, Supermarkets, Baby Shows/Events."*

22. Up to the relevant time (i.e. when LCMB provided the Labour Party with records in May 2017), LCMB's privacy notices gave no indication that personal data may be shared with the Labour Party or indeed with any political party or for the purposes of any political marketing. Based on the information LCMB provided, data subjects would not have foreseen that their data would be shared with a political party as described above.

23. At some point between 5 and 30 January 2018, it appears that LCMB updated its online privacy policy so as to add the words "and political parties" to the list of parties with whom it shared personal data. LCMB subsequently confirmed that this change was made in light of the commencement of the Commissioner's investigation. LCMB did not explain that change to the Commissioner in its letter of 30 January 2018.

24. In that letter, LCMB explained that it was not possible for someone to register with Emma's Diary without agreeing to their personal data being disclosed as described in LCMB's privacy policy. If individuals wished to register for LCMB's services, they had no choice but to agree to their personal data being shared with third parties for marketing purposes. Individuals could unsubscribe from receiving marketing communications by changing their preferences within their profiles. They could not, however, choose between marketing communications they wished to receive and those they did not wish to receive. Therefore, even if LCMB had made clear that personal data may be shared for the purposes of direct marketing by political parties, data subjects would not have been able to opt out of those purposes without thereby foregoing other marketing communications they have wished to receive, such as promotional offers and discounts.

25. The Commissioner has made the above findings of fact on the balance of probabilities.
26. The Commissioner has considered whether those facts constitute a contravention of the DPA by LCMB and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

27. As set out above, the "fairness" requirement under DPP1 included a transparency duty: controllers were required to provide or make available to data subjects information about (inter alia) the purposes for which their personal data will be used. LCMB failed to comply with that transparency duty in this case. It did not provide or make available to the affected data subjects information about the potential disclosure of their personal data to the Labour Party or to anyone else who might use that data for the purposes of political marketing.
28. The "fairness" requirement under DPP1 also included a substantive duty to treat individuals fairly when using their personal data. In particular, fairness involves adhering to individuals' reasonable expectations of how their data will be used and not using their data in ways that risk causing them damage or distress, unless there is some sufficiently weighty justification for doing so. LCMB failed to use the personal data of the affected data subjects fairly in this case. As indicated above, the data subjects would not reasonably have expected their personal data to be disclosed to a political party for the purposes of political marketing. Given in particular the party-political use of this data, this disclosure risked causing distress to some affected data subjects. LCMB had no adequate justification for acting as it did. Its actions appear to have been motivated by financial gain.

29. The extracts from LCMB's privacy policy set out above suggest that LCMB sought to justify its disclosure of personal data to third parties for marketing purposes by reference to condition 1 from Schedule 2, namely the consent of the data subjects. The Commissioner's assessment is that this condition was not met here. These "consents" were not specific and informed, given that the data subjects were not told that their data may be shared for the purposes of political marketing by the Labour Party or any other party. Nor were these "consents" freely given, given that, at the point of registration, the data subjects had no choice but to agree to the disclosure of their data for marketing purposes.
30. The only other potentially applicable condition from Schedule 2 in such cases is condition 6(1) (legitimate interests). The Commissioner's assessment is that this condition was not met here either. Given its failure to inform data subjects that their personal data may be shared with the Labour Party or indeed for any political purposes, the balance of interests entailed by condition 6(1) tipped against LCMB.
31. The Commissioner's assessment is thus that no condition from Schedule 2 to the DPA was satisfied in this case.
32. For those reasons, the Commissioner's assessment is that LCMB's disclosure of the personal data contained in the 1,065,220 records provided to the Labour Party (via Experian) in May 2017 contravened DPP1 in that:
- (1) The disclosure was unfair, in that the data subjects were not provided with information about the potential disclosure of their

personal data to the Labour Party or to anyone else who might use that data for the purposes of political marketing.

- (2) The disclosure was also unfair in that it contravened the reasonable expectations of the data subjects and exposed at least some of them to potential distress without any adequate justification.
- (3) Neither the consent condition, nor the legitimate interests condition, nor any other condition from Schedule 2 to the DPA was met.

33. The Commissioner is satisfied that LCMB was responsible for this contravention of DPP1.

34. For completeness, the Commissioner adds that, in her view, the processing outlined above was also likely to contravene the "lawfulness" requirement under DPP1: it is likely that LCMB's disclosure contravened the affected individuals' rights under Article 8 of the European Convention on Human Rights. In addition, DPP2 is likely to have been contravened: disclosure for the purposes of party-political marketing and insight is in the Commissioner's view incompatible with the purposes for which this data was collected, as outlined in the privacy notices cited above. In the Commissioner's view, however, those additional aspects of the contravention add little to the contravention of DPP1 already set out at paragraph 32 above. She therefore does not need to address those additional aspects further here.

35. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

The issuing of a monetary penalty

36. The Commissioner's preliminary view is that the conditions for issuing a monetary penalty under section 55A have been met in this case.
37. The Commissioner considers that this contravention was serious, in that:
- (1) The number of affected data subjects was very high (in excess of a million records having been disclosed).
 - (2) The data subjects were not only new mothers/mothers-to-be, but also very young children:
 - (3) In the Commissioner's assessment, this disclosure went very clearly against the terms of the privacy notices in place at the time. Disclosure for these purposes is wholly dissimilar to the purposes indicated in the privacy notices.
 - (4) The context – specifically the party-political context – of this disclosure created a real risk of distress (see further below).
 - (5) Individuals were exposed to a significant loss of control over their data, exacerbated by the fact that LCMB did not inform them about this disclosure before or after it had taken place.
38. The Commissioner considers that this contravention was of a kind likely to cause substantial damage or substantial distress, in that:

- (1) LCMB's privacy notices contained reasonably clear descriptions of the kinds of third parties who might receive personal data from LCMB. At least some of the affected data subjects are likely to have been distressed by this failure to adhere to their expectations about how their data would be used. At least some data subjects would reasonably feel misled.
- (2) The Commissioner notes that the data supply agreement between LCMB and Experian refers to disclosures for the purposes of postal communications and "insight". An affected data subject may reasonably infer that the Labour Party was subjecting her to a degree of profiling for political ends and without her knowledge. LCMB deliberately facilitated this. This is likely to be distressing to at least some affected data subjects.
- (3) Political views and affiliations are liable to touch on some individuals' sense of identity and/or private views. Some may reasonably be strongly opposed to being targeted for party-political marketing based on their particular family circumstances. They may reasonably consider this to be invasive.
- (4) In addition, given that LCMB failed to be transparent with the data subjects about this disclosure, the data subjects may well have been distressed by uncertainty as to how the Labour Party obtained information with which to target them based on their personal circumstances.
- (5) This sense of distress is likely to have been exacerbated by the fact that it focused on the affected data subjects' status as new or expectant mothers, as well as on their young children. It is

highly likely that at least some affected data subjects would have been distressed by the inclusion of their children's personal data in a party-political database – even for a limited period – without the knowledge or consent of their parents.

- (6) At least some of the affected data subjects are likely to be distressed by the perceived loss of control over their data when it was sent to Experian for inclusion in a Labour Party database for the purposes of both postal marketing and "insight".
 - (7) Given the considerations outlined above and the number of affected data subjects, it is likely that the "substantial distress" threshold was crossed here.
39. While it may not have set out to contravene the DPA, LCMB's actions were plainly deliberate. In any event, the Commissioner considers that LCMB knew or ought reasonably to have known that there was a risk that the contravention would (a) occur, and (b) be of a kind likely to cause substantial damage or substantial distress. She further considers that LCMB failed to take reasonable steps to prevent such a contravention, in that:
- (1) LCMB was aware of the terms of its own privacy notices. It should have been readily aware that those terms did not contemplate disclosure for these purposes.
 - (2) LCMB knew its customer base. It knew why they signed up for Emma's Diary and what kinds of marketing communications they normally received from third parties at LCMB's behest. It should have been very clear to LCMB that this disclosure contravened those norms and expectations.

- (3) In particular, if this was the first occasion on which LCMB shared data for such purposes, it should have considered whether this novel and unusual activity complied with its data protection obligations.
 - (4) Given its own knowledge of its customer base and the common-sense considerations summarised at paragraph 38 above, it should have been readily apparent to LCMB that this disclosure was likely to cause substantial distress to at least some affected data subjects.
 - (5) As referred to above, it appears that LCMB amended its privacy policy in January 2018 in an attempt to provide for such a disclosure to a political party. This shows that LCMB was alive to the kinds of steps that would be needed to avoid contraventions of the DPA in such circumstances, but it failed to take any such steps before disclosing these records in May 2017.
 - (6) LCMB could also have contacted the affected data subjects to seek their consent before making this disclosure, but it failed to do so.
40. The Commissioner's preliminary view is therefore that the statutory conditions for issuing a monetary penalty have been met in this case. She has considered all the circumstances and has reached the preliminary view that it is appropriate to issue a monetary penalty in this case.
41. That preliminary view is based on the number of affected data subjects, the likely consequences of such a contravention and LCMB's culpability

for it. The Commissioner has also considered the importance of deterring future contraventions of this kind, both by LCMB and by others. The Commissioner considers that this objective would be furthered by the issuing of a monetary penalty in this case.

The amount of the penalty the Commissioner proposes to impose

42. The Commissioner has taken into account the following mitigating features of this case:

- The Commissioner understands that this was the only occasion on which LCMB shared personal data with any political party or for the purposes of political marketing or political insight.
- LCMB states that Experian deleted the data from the Labour Party database after 8 June 2017.
- The proposed penalty will have a financial impact on LCMB, and may also have some reputational impact.

43. The Commissioner has also taken into account the following aggravating features of this case:

- Based on its data supply agreement with Experian, the Commissioner has concerns about the extent to which LCMB was in practice able to exercise or enforce control over the personal data it disclosed. It is not clear, for example, how LCMB satisfied itself that personal data would only be used for defined purposes and that it would be permanently deleted from the Labour Party database.
- It appears to the Commissioner that LCMB envisages making further disclosures of this kind in future. This is the only reasonable inference

from LCMB's amendment to the terms of its privacy policy once it became aware of the Commissioner's investigation. As indicated above, however, LCMB did not proactively inform the Commissioner that it had made this amendment. This only came to light when the Commissioner queried it.

44. In determining the amount of the penalty she proposed to issue, the Commissioner has considered all of the circumstances summarised in this notice, including in particular those at paragraphs 37-39 and 42-43 above. She has also considered LCMB's financial position, as evidenced by its published annual accounts. The Commissioner has also taken into account her underlying objective in imposing a monetary penalty notice, namely to promote compliance with data protection legislation.
45. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£140,000 (One hundred and forty thousand pounds)** is reasonable and proportionate on the facts of this case.

Conclusion

46. The Commissioner intends to make her final decision as to whether to serve a monetary penalty notice for such amount on or after **30 July 2018**. If LCMB wishes to make any representations in response to this notice, those representations must be made before that date. A sheet explaining the procedure for making representations is attached to this notice as Annex 1.
47. The Commissioner will make her final decision once she has considered any such representations from LCMB.

Dated the 2nd day of July 2018

Signed



Stephen Eckersley
Head of Enforcement
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

DATA PROTECTION ACT 1998

REPRESENTATIONS IN RESPONSE TO A NOTICE OF INTENT

The Information Commissioner has power under sections 55A and 55B of the Data Protection Act 1998 to serve a monetary penalty notice on a data controller. Before she exercises this power the Commissioner wishes to take account of all the relevant facts and arguments.

This Notice of Intent is to enable the person affected to put his side of the case. The Commissioner's intentions are set out in the accompanying Notice of Intent. If you wish to make representations on those matters you have an opportunity to do so. The closing date for this is in the accompanying Notice of Intent.

Representations should be made in writing. You may wish to comment on the facts and views set out by the Commissioner or to make general remarks on the case and enclose documents or other material. A data controller should also inform the Commissioner if any confidential or commercially sensitive information should be redacted from a monetary penalty notice.

All representations will be carefully considered by the Commissioner before a final decision is made.

Representations should be sent to Mark Thorogood, Solicitor, Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF or by email to [REDACTED]